

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 18, 2005

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v.

PRAIRIE MATERIAL SALES, INC.

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Docket No. LAKE 2004-94-M

A.C. No. 11-02972-21590

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

## ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On April 7, 2005, the Commission received from Prairie Material Sales, Inc. (“Prairie Materials”) a letter seeking review of an order of Chief Administrative Law Judge Robert J. Lesnick entering a default judgment for the Secretary of Labor in this matter.

On July 21, 2004, Chief Judge Lesnick issued a show cause order to Prairie Materials stating that it had failed to file an answer to a petition for penalty assessment sent to it by the Secretary of Labor on May 13, 2004, and that Prairie Materials would be found in default if it did not file an answer or show good cause for not doing so within 30 days of the order. On September 2, 2004, Chief Judge Lesnick issued an order finding that Prairie Materials had failed to respond to the show cause order and entering a judgment by default for the Secretary. On September 27, 2004, the Commission received a letter from Dave Mashek, the Safety Director of Prairie Materials, seeking review of the Chief Judge’s default order.

The Commission construed Mashek’s September 27 letter to be a timely filed petition for discretionary review, but did not grant review, noting the “the petition . . . does not address the validity of the Chief Judge's default order [or] provide any reasons why the default order should

be vacated.” 26 FMSHRC 800, 801 (Oct. 2004).<sup>1</sup> In a footnote, however, the Commission stated: “If Prairie Materials can justify its failure to answer the petition for penalty assessment and to respond to the show cause order, it may submit a request to the Commission, with supporting documentation, asking it to reopen this case.” *Id.* Review not having been granted, the judge’s order became a final order of the Commission on October 12, 2004.

The April 7, 2005 letter from Prairie Materials, also from Mashek, supplements the September 27 letter and renews the operator’s request to reopen this matter. In its request to reopen, Prairie Materials states: “I (David Mashek) personally suffered a loss of my son due to a tragic accident. During the time frame of the dispute of the citation I failed to properly respond to the Order of Default.” Attached to the letter is a funeral home announcement of the May 26, 2004 death of Mashek’s son. The letter provides few other details, and none as to why this event prevented the operator from complying with the judge’s July 21, 2004 Show Cause Order.

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 787 (May 1993). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

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<sup>1</sup> The Chief Judge’s jurisdiction in this matter terminated when his default order was issued on September 2, 2004. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission’s procedural rules, relief from a judge’s decision may be sought by filing a petition for review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a).

Having reviewed Prairie Materials' request, in the interests of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists to excuse Prairie Materials' failure to respond to the show cause order and for further proceedings as appropriate.

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Stanley C. Suboleski, Commissioner

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Michael G. Young, Commissioner

## Distribution

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